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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 521

PAUL H. KEPHART,

Petitioner,

vs.

IRMA N. KEPHART

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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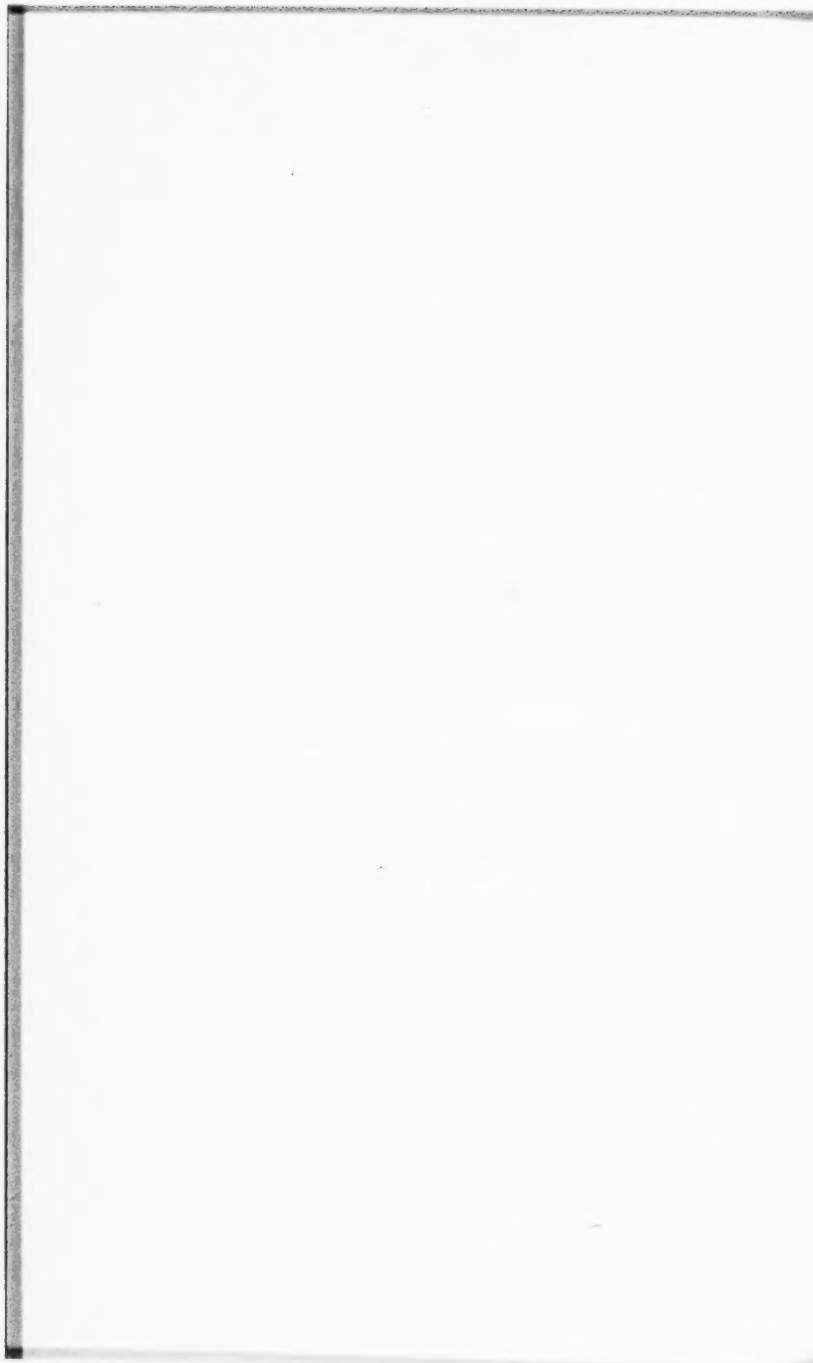

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Paul H. Kephart, petitioner herein, prays that a writ of certiorari issue to review the judgment entered October 11, 1951, in the United States Court of Appeals for the District of Columbia Circuit, in the cause entitled:

No. 10,446

IRMA N. KEPHART

vs.

PAUL H. KEPHART

In said Court but not yet reported.

Statement of the Matter Involved

Irma N. Kephart who was married to the petitioner herein obtained an absolute divorce from the petitioner, Paul H. Kephart, in the United States District Court for the Dis-

trict of Columbia (then the Supreme Court of the District of Columbia) in December, 1936, under which decree she was awarded the custody of the two minor children of the parties and the sum of seventy-five dollars ($75.00) per month as maintenance for herself and her two minor children (R. 8).

In 1940, the wife alleged, the above described maintenance payments became in arrears and while repeated demands for payment of the maintenance award were made by the wife no payments were made by the petitioner. By 1949 nearly nine years maintenance amounting to eighty-one hundred dollars ($8100) was in arrears, although the wife was fully aware of the whereabouts of the petitioner, no effort was made by her during the aforesaid period to recover the arrears until the recent motion was filed.

The Record in the trial court indicated that no action whatsoever had been taken there from 1940 until the motion to adjudicate in contempt was filed in 1949. The wife in her motion attempted to excuse her delay for seeking the aid of the court over the nine year period because of the fact that she had been unable to employ counsel because she had been ill and without funds with which to employ counsel to prosecute her claim.

In February, 1949, the wife filed a motion in the United States District Court for the District of Columbia in the divorce action (R. 14), seeking to adjudicate the petitioner in contempt for failure to comply with the order of said court of December, 1936, and for a money judgment. On the hearing of the motion on affidavits and counter affidavits, it was denied by the Motions Court Judge, without a written opinion (R. 32).

The United States Court of Appeals for the District of Columbia Circuit first heard the case on March 8, 1950, with a court of three judges.

Thereafter on January 5, 1951 the Chief Justice of this Court held a conference of all counsel, including counsel who were appointed as *Amici Curiae,* and read and gave to them the following memorandum.

"United States Court of Appeals

Washington 1, D. C.

January 5, 1951.

Memorandum to Counsel and to *Amici Curiae*

No. 10446

Re: *Kephart v. Kephart*

In *Franklin* v. *Franklin,* 83 U. S. App. D. C. 385, 171 F. 2d 12 (1948), in a maintenance action brought in 1934 by a wife, the husband was ordered to pay her $50 a month 'as maintenance for herself and the minor children.' He made payments until 1942, but then stopped making them. In 1946, the wife moved in the original action (a) to have the husband adjudged in contempt and (b) for a money judgment for the accumulated arrearages. The trial court found the wife guilty of laches and also that she was estopped by her representations to the husband (that she would not accept payments under her married name) and by her conduct in general (adulterous life with another). The wife's motion was denied by the trial court. On appeal, the question was whether a trial court has discretion to remit past due maintenance payments which have accrued under an order of the court in favor of a wife. This court in the appeal answered the question in the affirmative. It reasoned that suits for maintenance are equitable rather than legal; that the trial court exercised the discretion of a court of equity; that a court is not *required* to enforce payment of accrued instalments after a lapse of years. The court indicated that previous cases in this court which implied that the court ordering payments lacks authority to

apply equitable principles when asked to enforce them should be overruled. The court said: 'The power of the court of equity to adapt its remedial relief to existing conditions and circumstances should not be curtailed.'

There was a dissenting opinion to the following effect: 'The wife's misconduct may have justified this cessation (of payments of installments of alimony) had the husband taken proper steps to obtain relief because of it. He could have applied to the court . . . for a modification of the order to relieve him from further payments because of his wife's misbehavior. Instead of doing that, he took the law into his own hands and ceased to obey the court's order. It necessarily follows that as each monthly instalment of maintenance became due after December 1, 1942, it became a fixed obligation which the court had no power to remit.'

Kephart v. *Kephart* involves the same question as to the power of a trial court to remit past due instalments ordered paid by it in a wife's behalf. In that case, the wife obtained a divorce in the District of Columbia in 1936, and the trial court ordered the husband to pay her $75 a month as alimony and as maintenance for their children. Four days after the divorce, although the decree was not final until six months after its date, the husband married another woman and thereafter lived with her in Maryland. In 1937, the husband failed to make the payments then due his first wife under the divorce decree, but purged himself of contempt by finally paying them. In 1949, alleging nonpayment by him since 1940 and her own poverty and illness, the wife moved in the original proceeding in the District Court (a) to have the husband adjudged in contempt and (b) for a judgment of the arrears in alimony. The husband's defenses were (a) laches on the part of the wife, for which defense he cited the *Franklin* case and (b) election by the wife (she had also filed an action in Maryland to collect the unpaid instalments). An accompanying affidavit filed by the husband alleged that the children of the marriage had

since attained majority. The trial court denied all relief to the wife without explanation for its decision. On appeal the questions presented are (a) did the trial court properly refuse to hold the husband in contempt and (b) did it have authority to remit the unpaid instalments which had accrued to the wife under the divorce decree which stood without modification.

Kephart v. *Kephart* has been argued and submitted for decision and a rehearing *in banc* has been ordered by the court *sua sponte*. The purpose of the rehearing is to reconsider the decision in *Franklin* v. *Franklin*.

Counsel for the parties in *Kephart* v. *Kephart* may present such further briefs as they see fit. Counsel appointed as *amici curiae* are requested to present briefs fully discussing the question of the merit of the decision in *Franklin* v. *Franklin*. Oral argument will be allowed counsel for the parties and also *amici curiae*.

(Sd.) HAROLD M. STEPHENS,
Chief Judge."

Thereafter a rehearing was had before the full court of nine judges on April 30, 1951. On October 11, 1951 the court rendered its opinion wherein five judges were for the majority and three judges rendered a dissenting opinion along with one other judge who dissented in part and agreed with the majority opinion in part. The majority opinion reversed and remanded the case to the lower court.

Basis of Court's Jurisdiction

The jurisdiction of this Court is invoked, Title 28 U. S. C. A., Sections 1254 and 2101.

The judgment of the court below was entered on October 11, 1951. (See opinion of Appellate Court. R. 39).

Questions Presented

1. Under the District of Columbia statute involved does a trial Judge of the United States District Court

for the District of Columbia, sitting as an equity court, have the right to refuse to lend its aid to a request of a former wife for an adjudication of an arrears of alimony and for a citation for contempt against her former husband?

The trial court sat as an equity court in the proceeding before it. As such court it had great latitude in exercising its discretion as to the just and proper disposition of the matter before it. The court apparently determined that it would not lend its aid to the wife on her motion to adjudicate the husband in contempt and to adjudicate the arrearage of alimony. This was within the discretion of the court and it can not be said that its failure to use its power in granting the wife's request was an abuse of discretion. (See *The Steamship Styria* v. *Morgan*, 186 U. S. 9, 46 L. Ed. 1033; *Langnes* v. *Green*, 282 U. S. 540, 75 L. Ed. 526; *Continental Ill. N. B. & T. Co.* v. *C. R. I. & P. R. Co.*, 294 U. S. 677, 79 L. Ed. 1129; *Davis* v. *Davis*, 305 U. S. 38, 83 L. Ed. 29.)

This Court has repeatedly held that the question of an abuse of discretion by a court is dependent upon all the facts and circumstances surrounding the particular case. Thus, it is the will of the law and not the will of the judge towards which discretion must always seek to be directed. (See *Langnes* v. *Green, supra.*)

2. Under the circumstances in this case was it an abuse of the trial court's discretion to refuse to grant the wife's request for the relief sought?

In the case before the trial court the wife had sought to burden her former husband with a huge accumulation of alimony in arrears. This accumulation of over nine years would have imposed upon the husband an unconscionable burden which he could not have assumed at the time that payment was sought. His circumstances had changed and he was in no position to make any disposition of the huge

financial burden which the former wife sought to impose upon him.

The wife was a resident of the District of Columbia. The husband was a resident of Prince Georges County, Maryland which was just across the border of the District of Columbia. The method by which the wife obtained service of process upon the husband in 1949 could have been obtained upon him at any time during the nine year period during which she did nothing. Her delay was unexplained and inexcusable even though she attempted to assert that she was unable to do anything about seeking the payment of the alimony over the nine year period. Considering these facts, as the trial court must have, can it be said that the trial court abused its discretion in refusing the relief that the wife sought. Petition respectfully submits that there was no abuse of discretion of the trial court under the circumstances. (See *Hecht Co.* v. *Bowles*, 321 U. S. 328, 88 L. Ed. 759; *Sweeney* v. *Anderson*, 129 F. (2d) 756.)

This Court has held that where there is no abuse of discretion by a trial court, an appellate court can not reverse the decision of the lower court. Your petitioner respectfully represents to the court that such is the situation in the case now presented.

Reasons Relied On for the Allowance of the Writ

This case presents the following questions which your petitioner believes justifies this Court in granting a writ of certiorari:

1. A question of general importance.

2. A question of substance relating to application of a statute of the United States which has not been but which should be settled by this Court.

3. A question of proper or improper exercise of judicial discretion by a District Court trial judge.

Conclusion

WHEREFORE, petitioner prays that this Court grant the allowance of a writ of certiorari directed to the United States Court of Appeals for the District of Columbia Circuit so that its action may be reviewed and its judgment reversed.

Respectfully submitted,

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